Book Reviews

School Desegregation Law in the 1980's: Why Isn't Anybody Laughing?

Beyond Busing: Inside the Challenge to Urban Segregation. By Paul R. Dimond.* *Ann Arbor: The University of Michigan Press*, 1985. Pp. vii, 411. $29.95.

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> Then does segregation offend against equality? Equality, like all general concepts, has marginal areas where philosophic difficulties are encountered. But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description. Here I must confess to a tendency to start laughing all over again.
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> —Charles L. Black, Jr.[1]

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1. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

I.

Few could have anticipated at the time of the decision in *Brown v. Board of Education*[2] that the legitimacy of school desegregation would still be a subject of profound national debate over thirty years later. Yet public controversy continues largely unabated over questions that go to the very heart of the desegregation process. Does desegregation have any educational justification? Is busing an acceptable desegregation technique under any circumstances? Are the social and economic costs associated with desegregation so great as to justify abandoning the enterprise altogether? Given the complexity of such issues, all sides of the debate have been able to find at least some plausible scholarly and anecdotal support for their arguments.[3]

This state of affairs prompts one to ask whether the current debate would have been different had school desegregation remained largely a Southern phenomenon devoted to eradicating the state-imposed systems of racial separation in public education pervasive throughout that region. For opposition to desegregation did not gain national support until the process began moving North. It was only then that Congress became interested in the subject, considering and, sometimes, enacting thereafter legislation designed to curtail both judicial and administrative responses to public school segregation.[4] Presidents saw fit to place desegregation on

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2. 347 U.S. 483 (1954).

3. For a sampling of this debate in the literature, compare J. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION (1984) (generally supportive of comprehensive desegregation) with R. WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION (1984) (critical study of desegregation aftermath in Topeka, Kansas and four other communities whose cases were decided along with *Brown*). Both books are reviewed in Marshall, *The Burden of Assessing* Brown (Book Review), 3 YALE L. & POL'Y REV. 571 (1985). *See also* T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY, 61–72 (1984) (criticizing pro-desegregation policies); Jones, *The Desegregation of Urban Schools Thirty Years After* Brown, 55 COLO. L. REV. 515 (1984) (urging the implementation of comprehensive desegregation remedies). For two recent studies of specific desegregation cases, see D. MONTI, A SEMBLANCE OF JUSTICE: ST. LOUIS SCHOOL DESEGREGATION AND ORDER IN URBAN AMERICA (1985), and R. PRIDE & J. WOODARD, THE BURDEN OF BUSING: THE POLITICS OF DESEGREGATION IN NASHVILLE, TENNESSEE (1985). Renewed interest in the desegregation debate has probably been sparked in some quarters by the Reagan Administration's opposition to certain traditional techniques for establishing constitutional violations and to certain remedies, especially busing, in school cases. *See School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on Judiciary*, 97th Cong., 1st Sess. 614 (1982) (statement of William B. Reynolds, Assistant Attorney General, Civil Rights Division) ("The administration is thus clearly and unequivocally on record as opposing the use of mandatory transportation of students to achieve racial balance as an element of relief in future desegregation cases."). I have discussed the current administration's policies in more detail in Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 319–30, 339–41 (1984).

4. See Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980), for a history of existing congressional prohibitions against the ordering of busing as a desegregation remedy by the Department of Education. Efforts to divest federal courts of jurisdiction over school desegregation cases have thus far proven unsuccessful. *See* Letter from Attorney General William French Smith to Congressman Peter Rodino (May 6, 1982), *reprinted in Hearings on § 951 Before the Subcomm. on Courts, Civil Liberties, and*

their agendas, particularly the issue of busing.[5] Civil rights coalitions that had fought so successfully in the courts and Congress to promote desegregation in the South began to unravel as their members increasingly found themselves on opposing sides over desegregation at home in the North and West.[6]

Not all this newfound opposition to desegregation can be attributed to racism, political expediency and sheer hypocrisy. I believe that there were many Northerners who had genuine difficulty in understanding how school boards in their communities, where racial segregation had never been required by law, could be found in violation of *Brown*. They saw segregated schools in the North and West as largely the unavoidable consequence of segregated residential patterns. School boards could not be faulted, they felt, for adhering, on respectable educational grounds, to neighborhood student assignment plans—even where doing so produced a segregated school system that reflected the residential segregation.

Subsequent litigation should have shattered the myth that school boards outside of the South have consistently applied racially neutral criteria in administering their districts. Many people nevertheless continue to cling to the view that intensely segregated school attendance patterns cannot be laid entirely at the feet of school officials and that comprehensive desegregation plans that require busing and the abandonment of neighborhood schools are unwarranted and unfair. These misgivings have, in turn, made Northerners and Westerners far more sympathetic to claims that current segregation in the Deep South is similarly the result of demographics and segregative forces beyond the control of school boards. Perhaps there *is* something, they say to themselves, to Southerners' contention that they have been unfairly punished by the courts for assigning children to neighborhood schools, despite the fact that state-imposed segregation ended years ago. They find themselves echoing many of the concerns previously heard only in the Southern and Border States. What about these court-ordered remedies? Even granting that the school board acted unconstitutionally, does that conduct justify a system-wide busing plan? How can we be certain that the cure will not be worse than the disease, leaving the schools even more segregated after the court order? Hence, we see the

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the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 308-23 (1982).

5. See G. ORFIELD, MUST WE BUS?, 233-78, 279-316, 319-54 (1978), for a discussion of presidential politics with respect to desegregation during the Nixon and Ford Administrations. *See also* M. REBELL & A. BLOCK, EQUALITY AND EDUCATION: FEDERAL CIVIL RIGHTS ENFORCEMENT IN THE NEW YORK CITY SCHOOL SYSTEM 61-63 (1985); J. HOCHSCHILD, *supra* note 3, at 16-18.

6. *See, e.g.*, M. REBELL & A. BLOCK, *supra* note 5, at 83-85 (describing fragmentation among groups generally committed to school desegregation over HEW's charges of discrimination in faculty hiring and assignment in New York City school system). *See also* J. LUKAS, COMMON GROUND (1985) (on Bostonians' responses to school desegregation).

conversion of what initially was seen as a regional issue into a matter of national importance. All involved in the debate over school desegregation understand that its outcome will profoundly affect the future of the entire country.

Paul Dimond has written an extraordinarily informative and thoughtful book describing the process of bringing *Brown* North and the impact this process had upon national attitudes toward desegregation. Though a professor of constitutional law and an author of several significant works on racial discrimination,[7] Dimond has written *Beyond Busing* based upon his experiences as a lawyer who helped represent black plaintiffs in four of the most important desegregation cases of the last decade, involving school systems in Detroit (*Milliken v. Bradley*[8]), Wilmington (*Evans v. Buchanan*[9]), Columbus (*Columbus Board of Education v. Penick*[10]), and Dayton (*Dayton Board of Education v. Brinkman*[11]). In *Milliken*, the Supreme Court held that lower trial and appellate federal courts had erred in ordering a metropolitan desegregation plan requiring busing between school districts to remedy proven intentional segregative acts of the state and the Detroit school board within the Detroit district. In *Evans*, however, lower federal courts found that the Supreme Court's standards for metropolitan relief set forth in *Milliken* had been met sufficiently to warrant such a remedy with respect to Wilmington and its neighboring suburban school districts. The Supreme Court declined review. The *Columbus* and *Dayton* cases produced, as of this writing, the most definitive Supreme Court articulation of the standards for adjudging the constitutionality of racial segregation in school systems where separation of black and white children had not been required or explicitly condoned by positive law.

In *Beyond Busing*, Dimond makes several important contributions to the national debate. First, he provides an "anatomy" of a Northern school desegregation case. Although many are now willing to concede that Northern school boards have engaged in segregative activity, I doubt that more than a few truly understand the variety and pervasive nature of such

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7. P. DIMOND, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION (1985) [hereinafter cited by page number only]. His previous writings include A DILEMMA OF LOCAL GOVERNMENT (1978) (co-authored with C. Chamberlain and W. Hillyard); *School Segregation in the North: There Is But One Constitution*, 7 HARV. C.R.-C.L. L. REV. 1 (1972); *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982); *The Anti-Caste Principle—Toward A Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1 (1983).

8. 418 U.S. 717 (1974).

9. 447 F. Supp. 982 (D. Del.), *aff'd*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

10. 443 U.S. 449 (1979).

11. 443 U.S. 526 (1979).

practices. Northern school boards have made racial assignments not only of students, but of faculty and staff as well. They have also gerrymandered attendance zones, sited and closed old schools, changed grade structures, and controlled school building capacities, all to further segregation. Dimond describes in extensive and accessible detail the exceptional effort required of plaintiffs' lawyers to uncover these practices in Northern school cases and to demonstrate to a court's satisfaction that such practices were responsible for much of the existing school segregation.

Even for those who already know the basic story of segregation in the North, Dimond's description of the evidence, of the witnesses, of the lawyers and judges, and of the other participants in these cases, gives the familiar a power and poignancy that court opinions are unlikely ever to communicate. One watches federal judges, initially skeptical of plaintiffs' claims, slowly but firmly moved to understand that constitutional wrongs had been committed for which effective remedies must be devised. Dimond describes one lawyer, representing a group of intervening white neighborhood associations opposed to desegregation in Detroit, who was so struck by the force of the plaintiffs' case that he persuaded his clients to switch sides, in effect, and to press for full desegregation.

Second, Dimond's book is not only about school boards. It is also very much about residential segregation and about government culpability in creating it. He uses as his example *Hills v. Gautreaux*,[12] the Chicago public housing discrimination case. Although he was not involved in that case, Dimond gives it the same intimate treatment he accords the four school desegregation cases. Like those cases, *Gautreaux* is a story, as told by Dimond, of the movement from initial judicial hostility to plaintiffs' claim to full recognition by the courts that the law had been violated. The charge there—upheld by both lower courts and, ultimately, the Supreme Court—was that the intense segregation of public housing was not purely the result of voluntary choice and economic imperatives. Quite the contrary, plaintiffs alleged that the Chicago Housing Authority actively engaged in segregative conduct over a number of years, conduct that the federal Department of Housing and Urban Development took no steps to prevent or correct. Dimond's full treatment of *Gautreaux*, supplemented by his shorter discussions of the facts surrounding two additional housing discrimination cases decided by the Supreme Court,[13] provides a compelling rebuttal to those who claim that residential segregation is the result of purely adventitious events and, consequently, is not a proper subject for constitutional adjudication.

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12. 425 U.S. 284 (1976).

13. Warth v. Seldin, 422 U.S. 490 (1975); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

However, it is the third feature of Dimond's book that, in my estimation, lifts it far above the level of the all-too-familiar trial lawyer's collection of war stories. He has succeeded in translating his practical experience into a telling critique of the Supreme Court's school desegregation jurisprudence. Dimond's thesis is that segregated schools are produced by several factors of constitutional significance: (1) school boards take intentional action—such as racial assignment of students, faculty, and staff and other techniques already mentioned—to maintain a significant degree of racial separation in neighborhood schools; (2) the school boards' actions help create segregated neighborhoods, as families move towards the schools that their children attend; and (3) governmental institutions (local, state and federal) other than school boards promote further segregated residential areas through a wide variety of discriminatory practices.[14] Dimond's book analyzes and laments the Supreme Court's assiduous refusal to address forthrightly this third contention as an unconstitutional source of school segregation. It is to a consideration and elaboration of this critique, one I share with Dimond,[15] that I will devote the balance of my comments.

II.

As Dimond notes, the Supreme Court has concluded that the first two sources of segregated schools violate the Constitution and, where found, justify ordering school boards to undertake remedial desegregation programs. Given the fact that, at the time of *Brown*, positive law in Southern and Border states required or condoned segregated schools, the Supreme Court had little difficulty for the next fifteen years attributing the continued existence of one race or virtually one-race schools to unconstitutional local board action. School boards were charged, therefore, with an affirmative responsibility to eradicate these dual systems "root and branch."[16]

The debate over school board responsibility for segregated schools arose in the North in districts that either had never been subject to laws promoting segregation or had repealed them almost seventy-five years before *Brown* was decided. As a matter of history, it should be pointed out, as Dimond does only in part in discussing the early Northern desegregation case in Cincinnati,[17] that school board responsibility was not even clearly raised as an issue in many desegregation cases filed during the early

14. Pp. 56-59.

15. *See* 74 F.R.D. 271-76 (1976), for an earlier expression of my concern about the direction of school desegregation law.

16. Green v. County School Bd., 391 U.S. 430, 438 (1968).

17. P. 26 (discussing Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967), *reaffirmed after remand to district court*, 419 F.2d 1387 (6th Cir. 1969)).

1960's in Northern communities. Rather, the plaintiffs' central claim was that racial segregation (often referred to as "racial imbalance") violated *Brown* irrespective of school board culpability for the condition. What they argued, in essence, was that this form of segregation, while not so pernicious as that addressed directly by *Brown*, was, nevertheless, sufficiently harmful to the self-esteem, education and life chances of black children to justify imposing upon school boards an affirmative duty to take corrective action. Lower federal courts generally dismissed these arguments.[18] In fact, they flatly excluded evidence in school cases related to the impact of residential segregation upon segregated schools, on the grounds that the condition was created by parties not before the court and not subject to school board control.[19]

During this period, the Supreme Court avoided confronting these issues by denying review.[20] In the early 1970's, however, it considered *Keyes v. School District No. 1*,[21] the Denver, Colorado case. There, the lower courts held that, even though Colorado and Denver had never required or condoned segregated schools by law, the Denver school board nevertheless had engaged in intentionally segregative acts that violated the Fourteenth Amendment rights of black and Mexican-American children. Where, as in Denver, the school board had been engaged in a "systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities," the board could properly be held to be administering a dual system in violation of *Brown*.[22] After the Denver decision, it was no longer legally accurate or helpful to distinguish between Southern and Northern school segregation. Judges in Northern desegregation cases would, thereafter, have to focus explicitly upon the extent to which school board action produced racial separation, free of any presumption to the contrary.

Ironically, the Supreme Court's first recognition of the second source of segregated schools, namely, segregated residential areas that had devel-

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18. *See, e.g.*, Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Craggett v. Board of Educ., 338 F.2d 941 (6th Cir. 1964); Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Bell v. School City, 213 F. Supp. 819, 831 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). *But see* Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961) (New Rochelle, N.Y. board found guilty of intentional segregation); Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964) (de facto segregation ordered remedied); Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962). For a comprehensive discussion of this period, see Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965).

19. Deal v. Cincinnati Bd. of Educ., 369 F.2d at 60 n.4, 419 F.2d at 1392.

20. *See, e.g.*, Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Bell v. School City Gary, Indiana, 213 F. Supp. 819, 831 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

21. 413 U.S. 189 (1973).

22. *Id.* at 201.

oped partly as a result of segregative actions by school boards, occurred in a Southern rather than a Northern case.[23] In 1971, the Court considered in *Swann v. Charlotte-Mecklenburg Board of Education*[24] claims by the Charlotte-Mecklenburg, North Carolina school district that, though segregated schools had been required by state law at the time of *Brown*, the board had for some years operated its schools on a nondiscriminatory basis. To the extent that its system was still largely segregated, the board claimed that the situation was not of its making. Instead, the board contended, forces over which it had no control had created residential segregation that necessarily resulted in segregated neighborhood schools. The Supreme Court's response, affirming lower court findings, was, first, that the Charlotte board had never discharged its affirmative duty imposed by *Brown* to dismantle its prior state-imposed dual system, and instead had engaged, post-*Brown*, in a series of intentionally segregative acts. Second, its answer to the board's denial of responsibility for residential segregation, reflected in segregated neighborhood schools, was that there was a reciprocal segregative effect for which the board must be held partially responsible. According to the Court, not only are schools placed where people move, but people move to where schools are placed. Consequently, the board's practices of opening and abandoning schools and of changing grade structures and attendance boundaries of schools to maintain segregation played a part in people's decisions as to where they would live.[25]

The *Swann* decision was a crucial development in school desegregation law, for it broke a "log-jam" in the lower federal courts with respect to the nature and scope of the remedial duty that had delayed meaningful relief in many Southern communities for years.[26] Moreover, it provided building blocks for the assault in *Keyes* upon Northern school segregation.[27] Although the Supreme Court's rejection of the Charlotte board's claim was not surprising in view of the district's history of state-imposed racial separation, one would have thought that the Denver board, acting in a state and city with no such history, would have had more success asserting similar claims. Nonetheless, the Supreme Court found *Swann* controlling.

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23. Some Northern courts had recognized this point, however, in passing on claims of segregative site selection for school construction. *See, e.g.*, Sealy v. Department of Pub. Instruction, 159 F. Supp. 561 (E.D. Pa. 1957), *aff'd*, 252 F.2d 898 (3d Cir), *cert. denied*, 356 U.S. 975 (1958).

24. 402 U.S. 1 (1971). For an insightful analysis of *Swann* and its implications for desegregation remedies, see Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L.J. 1741, 1747-52 (1985).

25. *Swann*, 402 U.S. at 20-21.

26. *See* ORFIELD, PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-1980, at 4-5 (1983).

27. *See* Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971).

In retrospect, the Court's failure in *Swann* to address candidly the relationship between school and residential segregation may be significantly responsible, however unintended at the time, for the lack of realism that characterizes today's debate over both liability and remedy in school cases. The truth, which the Court refused to acknowledge except in passing,[28] was that forces beyond the school board's control *had* produced segregative effects in Charlotte schools. Schools that had been white in 1954 were black in 1971 as white families moved out of adjacent neighborhoods and black families moved in. Economics had allowed many whites but not blacks to move into areas on the fringes of the city or in its suburbs, away from concentrations of blacks. The Court's failure there was not, then, that it held the board responsible in part for the residential segregation that its neighborhood schools served. It was clearly correct to do so. Rather, it failed by refusing to assess the nature and impact of other forces upon residential segregation and segregated schools.[29]

The Court's omission in this connection, obscured by a unanimous opinion in *Swann*,[30] was subjected in the Denver case to stinging criticism from two Justices usually at opposite ends of the spectrum on racial dis-

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> The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented. Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.

Swann, 402 U.S. at 14 (citations omitted).

29. It is arguable that the Court in *Swann* simply meant to postpone larger questions of state responsibility for segregated schools to another day:

> The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. *We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.*

Id. at 22-23 (emphasis added).

Subsequent events have revealed, however, as the discussion below reflects, that both the Supreme Court and lower federal courts have treated this language less as a postponement in addressing such issues than a suggestion that they may not appropriately be raised in school desegregation suits.

30. Without intending to rekindle the heated controversy sparked by Woodward and Armstrong, B. WOODWARD & S. ARMSTRONG, THE BRETHREN 95-112 (1979), I think that their description of the intense negotiations that produced unanimity in *Swann* is consistent with what others have noted about the opinion's ambiguities, *see* Fiss, *supra* note 27, at 703 n.11, and with a description in a recent scholarly treatment of how the Court arrived at its decision in *Swann*, *see* B. SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT 127, 149 (1986).

crimination questions.[31] Both Justice Powell and Justice Douglas pointed out that school boards alone could not be held responsible for the continued existence of segregated schools, either in the North or South. Rather, they argued that a variety of other forces contributed to the creation and maintenance of segregated neighborhood schools. As to the nature of such other forces, however, Powell and Douglas differed markedly, the former arguing that private choice and economic conditions caused residential segregation, the latter seeing the source of the problem as a web of governmental segregative action working in tandem with demographic factors. Not surprisingly, in view of their quite different visions of the sources of residential segregation, Justice Powell concluded that a school board could discharge its constitutional duty in a highly segregated residential community merely by adhering to a strict neighborhood school assignment policy. Justice Douglas, in contrast, took the position that one state agency, the school board, should be held responsible for remedying the condition of school segregation caused by other governmental institutions. For him, state responsibility could not be so fragmented as to leave the victims of governmentally fostered segregated schools with no remedy whatsoever.[32] Justice Douglas' opinion in *Keyes* is as close as the Supreme Court has ever come to recognizing Dimond's third argument as to the source of segregated schools.

III.

Instead of grappling directly with the complexity of residential segregation as it bears on segregated schools, the Court has over the last eighteen years placed an impressive array of procedural hurdles in the paths of school boards seeking to avoid liability for continued racial segregation. The first of these hurdles was the continuing affirmative responsibility of school boards in systems that formerly had been segregated by order of state statute to eradicate "root and branch" the existence of white schools and black schools. This duty played an important role in the Court's resolution of the Charlotte-Mecklenburg case. It was originally articulated, however, three years before *Swann* in a masterpiece of test case litigation: *Green v. County School Board.*[33]

For ten years after *Brown*, school boards fought any, even token, integration tooth and nail. Civil rights lawyers ultimately defeated a series of

31. *See* Keyes v. Denver School Dist. No. 1, Denver, Colorado, 413 U.S. 189, 214 (1973) (opinion of Douglas, J.); 413 U.S. at 217 (opinion of Powell, J., concurring in part and dissenting in part).

32. Justice Douglas' view of the state has long been a part of Fourteenth Amendment jurisprudence. *See, e.g., Ex Parte* Virginia, 100 U.S. 339 (1880); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649, 658 (E.D. La. 1961).

33. 391 U.S. 430 (1968).

these efforts to maintain the status quo ante. In the mid-1960's, however, in hopes of delaying desegregation further, many school boards began instituting so-called freedom-of-choice plans. Under these plans, black and white children formerly assigned to segregated schools by law could choose to attend schools in which their race was not in the majority. Given the inertia produced by generations of segregation and threats directed against those considering transfers, it is not surprising that few students sought reassignment. However, some lower federal courts viewed such plans as eminently fair and non-coercive.[34] Others found them consistent with what they understood to be the responsibility imposed upon school boards by *Brown*: to desegregate, not to integrate.[35] In other words, courts believed that the school boards' duty was only to end racial assignment of students, not to correct for continuing segregation that flowed from earlier state-imposed racial assignment practices.

In order to present an effective challenge to freedom-of-choice plans, plaintiffs' lawyers needed a case that starkly presented the continued existence of segregation and the unlikelihood of its being remedied without affirmative school board action. *Green*,[36] the New Kent County school case, provided such an opportunity. New Kent had one white school and one black school at the time of *Brown*, a situation that had improved little in the subsequent decade, despite a board-initiated freedom-of-choice plan that permitted students to transfer to the school from which they previously had been excluded by law. During the three years that this program was in effect, not a single white child chose to attend the school historically designated for blacks, and only a small percentage of blacks enrolled in the traditionally all-white facility. From a demographic standpoint, not much had changed in rural New Kent County during the intervening years: There was no significant residential segregation either at the time of *Brown* or ten years later.[37]

In view of this factual pattern, it was clear to the Court that the crea-

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34. Indeed, many freedom-of-choice plans required every pupil to exercise a choice at the start of each school year rather than automatically assigning them back to the one-race schools they previously attended. In other cases, however, unless students opted to transfer to schools traditionally designated for children of the opposite race, student assignments remained unchanged. For a general discussion of such plans, see Singleton v. Jackson Mun. Separate School Dist., 355 F.2d 865 (5th Cir. 1966); Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986).

35. This formulation is usually attributed to a three-judge court decision in Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) ("The Constitution, in other words, does not require integration. It merely forbids discrimination."). In contrast, the Court of Appeals for the Fifth Circuit held in the mid-1960's that affirmative steps were required. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967).

36. Green v. County School Bd., 391 U.S. 430 (1968). The two companion cases decided with *Green*, Raney v. Board of Educ., 391 U.S. 443 (1968), and Monroe v. Board of Comm'rs, 391 U.S. 450 (1968), similarly did not involve large urban or metropolitan areas.

37. *Green*, 391 U.S. at 442 n.6.

tion and continued existence of the segregated schools were the result of board action, unaffected by other forces, governmental or otherwise. The Court also recognized that the remedy for this continued segregation lay within the power of the board.

Charlotte-Mecklenburg, however, presented a far more complex picture of school board liability for continuing segregation than did New Kent County. In *Swann* there was evidence of residential segregation both before and after *Brown*, caused by forces of which segregative school board action was only one. Moreover, the presence of these other forces raised questions not evident in *Green* about the board's ability to devise an effective desegregation remedy. Despite these significant differences, the Court applied the *Green* precedent to the facts of *Swann*. The Court's only concession to the reality of intervening segregative causes was to permit the school board, in devising a comprehensive remedy, to demonstrate that remaining one-race schools were not solely the vestiges of the former dual system but the result of other forces as well.[38]

The second procedural hurdle for school boards was formulated in *Keyes*, the Denver case. Lower courts found intentional segregative school board action with respect to only some schools within the district. Yet there existed throughout the system a high degree of segregation of blacks and Mexican-Americans from whites. How could a system-wide remedy be justified under these circumstances? The Court had two answers. First, it held that where intentional segregative action was found to have been present in a significant part of the system, unconstitutional intent would be presumed at work throughout the system as a whole.[39] Second, where segregative effects of intentional board action could be found in a significant part of the system, similar effects would be presumed as to the entire system.[40] The board was free, however, to rebut either of these presumptions through the introduction of competent evidence.[41] Stated differently, faced with uncertainty as to the impact of forces other than the school board's upon racial separation, the Court placed upon the board, rather than upon the plaintiffs, the burden of sorting out the nature, scope and effect of such forces.

The third and most recent procedural hurdle was set up by the Supreme Court in the *Columbus/Dayton*[42] decisions. In the late 1880's,

38. *Swann*, 402 U.S. at 26.

39. Keyes v. School Dist. No. 1, Denver, Colorado, 413 U.S 189, 203 (1973).

40. *Id.* at 201-05.

41. The Court invited the school board, in the event it could not disprove the claim of segregative intent, to show for example "that its past segregative acts did not create or contribute to the current segregated condition" of schools outside the geographic area where its illegal conduct had occurred. *Id.* at 211.

42. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman,

Ohio repealed laws requiring racial segregation in public schools. Until the early part of this century, Columbus and Dayton assigned children, for the most part, on a non-racial basis. Thereafter, however, both districts began a systematic practice of racial assignment of faculty, staff and students, which in the case of faculty and staff continued almost to the time desegregation suits were filed in the early 1970's. In addition, both districts employed many of the other classic segregative techniques.

In the *Dayton* case, which was decided before *Columbus* at the trial court level, the district court found that the board had engaged, decades earlier, in systematic racial assignment practices. The court concluded, however, that these practices had long ago ceased and that existing evidence of contemporary segregative actions was insufficient to justify system-wide relief, even considering the *Keyes*[43] presumptions. After three trips to the court of appeals to prod an unsympathetic trial court judge to action, the plaintiffs' lawyers obtained an order requiring a system-wide desegregation plan in Dayton.[44]

Before this order could be implemented, however, the Supreme Court granted review. In an opinion by Justice Rehnquist, the Court reversed the court of appeals, holding that the circuit court's system-wide desegregation rulings were unsupported by the record.[45] It remanded the case to the district court for more specific findings respecting the plaintiffs' claims of segregative activity by the board. Central to Justice Rehnquist's opinion was the novel principle of "incremental segregative effect."[46] Though lawyers on both sides of the school desegregation question had difficulty understanding its full implications, the principle, viewed most narrowly, seemed to suggest that the Dayton and other federal trial courts should (1) identify segregative board actions; (2) assess their impact upon segregated schools in the district discounted by factors beyond the school board's responsibility; and (3) order a remedy directed only to that residuum of segregation directly attributable to the board.

The *Dayton I* decision, as it has come to be called, appeared to turn *Keyes* on its head: rather than *enjoying* a presumption that a school board's intentional segregative actions created a segregative effect, plaintiffs now would have the burden of *rebutting* a presumption that forces beyond the school board's control were largely responsible for the existing segregation. Upon remand in *Dayton I* and at trial in *Columbus*, plaintiffs' lawyers set about to undermine this concept of "incremental segrega-

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443 U.S. 526 (1979) (*Dayton II*).

43. The district court's ruling is described in the court of appeals' decision reversing it. Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974).

44. *See* pp. 147-64.

45. 433 U.S. 406 (1977) (*Dayton I*).

46. *Id.* at 420.

tive effect." Suffice it to say that this effort was successful. The Supreme Court decided in its second consideration of the Dayton case (*Dayton II*),[47] heard with *Columbus*, that *Dayton I* was *not* to be read as a rejection of *Keyes*. Moreover, the Court finally accepted a doctrine that had been urged upon it unsuccessfully in *Dayton I* which, even more clearly than the *Keyes* presumptions, placed the burden on school boards either to prove the effects of intervening segregative forces or submit to the imposition of system-wide remedies. Specifically, the Court applied the full force of the affirmative duty to desegregate that was articulated in *Green*, a Southern case, to systems that had not been required by law to segregate children for ninety years. According to the Court, the records in *Columbus* and *Dayton* reflected that both school districts at the time of *Brown* were operating dual school systems, albeit by board action rather than pursuant to positive law. Consequently, from that date on, both boards had an affirmative constitutional duty to eradicate their dual system "root and branch."[48]

The feature of this new doctrine most favorable to plaintiffs' lawyers in Northern school cases was the lower level of proof required to justify system-wide remedies. Under *Keyes*, plaintiffs had the initial burden of establishing that the school board acted with segregative *intent. Columbus/ Dayton II*, however, required plaintiffs to prove only that a dual system existed in 1954 and that the school board actions had had segregative *effect.* Board conduct that in another context might be viewed as "neutral," such as strict assignment of students to neighborhood schools, would fail under that test. Such acts would simply be further proof of the board's failure to discharge its affirmative responsibility to desegregate.

The Court's adoption of these three procedural hurdles undoubtedly was driven in part by a desire to avoid the difficult problems of multiple causality in school segregation cases. In fairness, however, the Court also relied upon important public policy considerations, as well as upon well-established legal doctrine outside the desegregation area. In *Swann*, the board's own delay in complying with *Brown* had allowed intervening segregative forces to work their effects. If the Court had entertained the board's claims seriously, it would have provided further excuses for Charlotte and other districts in the Southern and Border states to delay, rendering even more difficult the implementation of any meaningful remedy.

The *Keyes* presumptions also find support in other areas of the law, notably antitrust.[49] Where a plaintiff is able to show, for example, that

47. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

48. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979).

49. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-25 (1969).

the defendant engaged in monopolistic practices in violation of the antitrust laws to the plaintiff's detriment, the burden shifts to the defendant to show the extent to which forces other than its own illegal conduct contributed to the plaintiff's injury. Absent such a showing, the defendant must bear full responsibility for the plaintiff's injury. The "risk of uncertainty" with respect to causality is borne by the violator rather than the victim. Furthermore, one can locate in tort law, the font of causality principles, support for the Court's rejection of the boards' claims in both the *Columbus* and *Dayton II* cases. Just as tortfeasors may not avoid responsibility by claiming that others had also acted illegally, school boards would not be allowed to escape liability by arguing that, while they may have acted unconstitutionally, segregated schools would have resulted for other reasons, even without their involvement.[50]

In contrast, the Court's setting of 1954 as the bright line for the imposition of an affirmative desegregative responsibility upon school districts outside of, as well as in, the South was nothing less than a *tour de force.* As already indicated, school boards in the South, to which *Brown* was specifically addressed, did not learn from the Supreme Court until at least 1968 that such an affirmative responsibility existed. Moreover, it was not until 1971[51] that Southern systems were given clear guidance from the Court as to how that affirmative responsibility was to be discharged. Finally, the Court did not seem to regard Ohio's pre-1887 history of state-imposed segregation as a dispositive factor in its decision to link Columbus and Dayton with New Kent County and Charlotte-Mecklenburg. Consequently, the Ohio school boards understandably, but unsuccessfully, argued that it was the 1973 *Keyes* decision, announced after the Dayton suit was filed, and not *Brown*, that established for the first time the constitutional responsibilities of systems with no recent history of state-imposed segregated schools.

However much one seeks to explain these decisions, from *Green* to *Columbus/Dayton II*, in precedential terms, below the surface they appear to reflect frustration on the Court in the face of several realities. First, the

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50. *See generally* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265-68 (5th ed. 1984) (discussing substantial factor analysis); RESTATEMENT (SECOND) OF TORTS, § 433B, comment on subsection (1) (same). Subsequent to *Keyes*, the Court made explicit this burden-shifting process in constitutional litigation. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270 n.21 (1977); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

51. *Swann*, 402 U.S. at 1. Though only injunctive relief was sought in these desegregation cases, it is nevertheless interesting to compare this approach to that taken with respect to the immunity of government officials for unconstitutional conduct, where clarity of controlling law is critical in establishing liability. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("clearly established statutory or constitutional rights of which a reasonable person would have known"); Wood v. Strickland, 420 U.S. 308, 322 (1975) (defendant "knew or reasonably should have known" conduct was unconstitutional).

Justices could not ignore the fact that twenty to twenty-five years after *Brown*, many school districts had not even begun meaningful desegregation efforts. Further passage of time would make the development of meaningful desegregation remedies exceedingly difficult, if not impossible. Second, it was no longer possible to pretend that the continued existence of unconstitutionally segregated schools was only a Southern, rather than a national, problem. The Court would have to devise doctrines that responded accordingly.

Not only school boards faced procedural hurdles during this period, however, as Dimond's thorough treatment of the Detroit and Wilmington[52] cases reveals. In Detroit, the plaintiffs were able to establish that the local school board and the State of Michigan had acted in tandem to create and maintain segregated schools within the city of Detroit. Additionally, the record reflected a pattern of school construction that had been approved and funded by the state both within the Detroit district and in neighboring suburban districts that contributed to the segregated character of all schools in the area. Schools in Detroit were overwhelmingly majority black and Hispanic; those in the suburbs were almost all-white.

The lower courts concluded that this history of segregative activity by both the Detroit school board and the state of Michigan necessitated a remedy that went beyond the limits of Detroit to encompass many of the surrounding districts.[53] Like Justice Douglas in *Keyes*, those courts viewed the "state" as the principal governmental entity reached by the Fourteenth Amendment: Where the state was shown to have violated the Constitution, courts could order remedies to the full extent of the state's power to implement them. The fact that the state of Michigan had decided to delegate some responsibilities for public education to numerous local districts should not disable federal courts from providing effective remedies for the state's segregative acts. Whether the suburban districts themselves had engaged in segregative acts was, under this theory, irrelevant.

The Supreme Court disagreed. In *Milliken v. Bradley*, it rejected the proposed metropolitan remedy, announcing the principle that only where there is a "constitutional violation within one district that produces a significant segregative effect in another district,"[54] would interdistrict desegregation be constitutionally justified. Failing that, federal courts must respect the "deeply rooted" tradition in American public education, honored in Michigan, of local control over the operation of schools. The Court

52. Milliken v. Bradley, 418 U.S. 717 (1974); Evans v. Buchanan, 447 F. Supp. 982 (D. Del. 1978), *aff'd*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

53. 345 F. Supp. 914 (E.D. Mich. 1972), *aff'd*, 484 F.2d 215 (6th Cir. 1973).

54. 418 U.S. at 745.

found no significant segregative effects with respect to the fifty-three districts surrounding Detroit.

In *Evans v. Buchanan*,[55] the Wilmington desegregation case, the plaintiffs' lawyers were able to meet the strictures imposed by *Milliken*. But success there was facilitated by two distinctive features. First, Delaware had been before the Supreme Court as a party to one of the cases decided with *Brown*, urging the constitutionality of its "separate-but-equal" public school attendance laws.[56] Second, the state had at that time and for many years thereafter engaged directly in the creation and maintenance of segregation throughout the state, ignoring local district lines to accomplish that end. Unlike Michigan, therefore, Delaware had committed segregative acts that resulted in a virtually all-black city school system (Wilmington) as well as substantially all-white schools in the suburban areas surrounding that city (New Castle County). The lesson of *Evans*, it seems to me, is that whatever hope *Milliken* left of plaintiffs' obtaining metropolitan desegregation remedies lay in Deep South or Border communities where states engaged in pervasive segregative actions cutting across district lines. Though there may be successful interdistrict lawsuits of this type,[57] the restricted vision of government responsibility remains the principal legacy of *Milliken*: The state may act through various and sundry entities to create and promote segregated schools; but only where it can be proven that the state acts through particular school boards or directly upon school systems will desegregation remedies be justified, on either an interdistrict or *intradistrict* basis.

IV.

Why has the Court not addressed directly the role of governmental institutions other than school boards in fostering the residential segregation that is reflected in segregated schools and school districts, North and South? As Dimond recounts in some detail, the explanation cannot lie in the Court's ignorance of such segregative forces in American life. Through its own decisions, the Court has documented the pervasive nature of government imposed or condoned housing discrimination, "a relic of slav-

55. 447 F. Supp. 982 (D. Del.), *aff'd*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

56. Gebhart v. Belton, 347 U.S. 483 (1954); pp. 298–301.

57. Indeed, several post-*Milliken* interdistrict remedies have been ordered in such contexts. *E.g.*, Morrilton School Dist. No. 32 v. United States, 606 F.2d 222 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); United States v. Missouri, 515 F.2d 1365 (8th Cir. 1975); Hoots v. Pennsylvania, 672 F.2d 1107 (3d Cir.), *cert. denied*, 459 U.S. 824 (1982); Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 584 F. Supp. 328 (E.D. Ark.), *rev'd*, 738 F.2d 82 (8th Cir. 1984). *But see* Jenkins v. Missouri, No. 77-0420-CV-W-4, slip op. (W.D. Mo. June 5, 1984) (rejection of interdistrict remedy); Armour v. Nix, No. 16708, slip op. (N.D. Ga. Sept. 24, 1979), *aff'd mem.*, 446 U.S. 930 (1980) (same).

ery."[58] Government actions have ranged from ordinances that forbade any black person to establish a home in a white community (or vice-versa)[59] to restrictive covenants enforced by state and federal courts,[60] to the use of referenda to frustrate state and local efforts to achieve housing integration.[61]

The centerpiece of this story, one Dimond's book takes as a major focus, is the *Gautreaux* case.[62] It is a textbook example of how the Chicago Housing Authority (CHA) was able to maintain well into the 1970's a starkly segregated pattern of public housing with the approval of federal housing authorities. One of the Court's most important conclusions was that the Chicago Housing Authority's segregative actions, abetted by the federal Department of Housing and Urban Development (HUD), resulted not only in keeping black and white housing apart within the City of Chicago, but also in ensuring that public housing *outside* of the city remained largely white. For, as the Court found, HUD had consciously refused to construct public housing outside of Chicago, which it had power to do, joining instead with the CHA in keeping blacks in segregated public housing within the city limits. Based upon these findings, the Court approved lower court orders requiring housing remedies in *Gautreaux* that crossed city-suburb boundaries.

Moreover, in a number of school cases the Supreme Court has been presented with records containing substantial evidence and lower court findings of government policies and practices, apart from school board action, that contributed significantly to both housing segregation and segregated schools.[63] The plaintiffs' lawyers in the *Swann* case introduced evidence on how local, state and federal agencies had promoted and helped to maintain segregated residential patterns through private home mortgaging practices, location of public housing, urban renewal projects and construction of highways. Both the trial and appellate courts found this evidence persuasive.[64] Yet the Supreme Court's reaction to such evidence and findings was essentially to ignore it, stating, "one vehicle can carry only a limited amount of baggage."[65]

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58. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).
59. Buchanan v. Warley, 245 U.S. 60 (1917).
60. Shelley v. Kraemer, 334 U.S. 1 (1948).
61. Reitman v. Mulkey, 387 U.S. 369 (1967); Hunter v. Erickson, 393 U.S. 385 (1969).
62. Hills v. Gautreaux, 425 U.S. 284 (1976).
63. United States v. Board of School Comm'rs, 456 F. Supp. 183, 189 (S.D. Ind. 1978), *aff'd in part & vacated in part*, 637 F.2d 1101, 1110-11 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) (violations by Housing Authority of the City of Indianapolis partial basis for ordering limited interdistrict remedy); Evans v. Buchanan, 393 F. Supp. 428, 435 (D. Del.) (three-judge court), *aff'd per curiam*, 423 U.S. 963 (1975) (court found violations by Wilmington Housing Authority and ordered interdistrict remedy).
64. 431 F.2d 138 (4th Cir. 1970).
65. *Swann*, 402 U.S. at 22. As I mentioned earlier, this phrase could be read as simply an indica-

In discussing the trial of *Milliken*, the Detroit case, Dimond describes the painstaking efforts he and his co-counsel made to "educate" the trial judge on this issue, efforts that proved successful. They presented proof, for example, that the Michigan Supreme Court enforced racially restrictive covenants in real estate contracts right through to the day in 1948 that the United States Supreme Court ruled such practices unconstitutional in *Shelley v. Kraemer* (from St. Louis) and its companion case from Detroit, *McGee v. Sipes*.[66] They established, moreover, that in 1947 racially restrictive covenants blanketed those areas of Detroit that were still all-white in 1971, and that such restrictive covenants also were prevalent in all of the city's suburbs that had been platted by 1950. Such covenants continued to appear in all subsequent deeds, abstracts and title insurance policies of Detroit's largest title company until 1969.

The attorneys also offered probative evidence of direct governmental involvement in creating and maintaining residential segregation. The Federal Housing Administration (FHA), for example, had promoted racial restrictions and "whites only" private housing in Detroit. Racially dual public housing was constructed with black projects in designated black tracts and white projects in neighborhoods reserved for whites. Michigan governmental agencies with responsibility for the licensing of real estate brokers encouraged their licensees to engage in practices that reinforced residential segregation, including discriminatory treatment of black realtors. And law enforcement officials consistently failed in their duty to protect blacks seeking homes in traditionally white areas of Detroit from mob violence that successfully drove them from their intended new homes.

The plaintiffs' expert witnesses gave unrebutted testimony that the racial exclusion of blacks from all-white areas did not stop at the Detroit city limits but extended throughout the neighboring white suburbs. They also testified that racial discrimination, not "free choice" or "economics," appeared to be a primary cause of residential segregation in Detroit. Altogether, the evidence strongly suggested that blacks lacked the option many defenders of neighborhood schools claimed; they could not readily move to provide their children with a desegregated education.

In addition to this "Detroit-specific" evidence, the plaintiffs' lawyers introduced expert testimony with respect to federal government support for residential segregation nationally. They testified that the Federal Housing Administration had long endorsed racial segregation and sup-

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tion that the Court wished to leave this issue for another day, because it had ample basis for requiring the Charlotte-Mecklenburg Board to implement a system-wide desegregation plan. *See supra* note 29. But I think that the phrase is properly read in view of the Court's subsequent actions as a "door-closer" to consideration of such issues in school cases.

66. 334 U.S. 1 (1948).

ported all-white developments, requiring, for example, in a late 1930's underwriters' manual (still in use in the 1950's) that "whites-only" housing be served by "whites only" public schools. Additionally, the plaintiffs' experts testified that the Veterans Administration, the Federal Public Housing Agency, the Home Loan Bank Board, the Comptroller of the Currency, the Federal Reserve Board and the Federal Deposit Insurance Corporation all supported residential segregation for many years, and, even after their active support ended, that they were indifferent to the continuing segregative effects of their past practices. All told, these federal agencies had been involved with approximately eighty percent of the housing built in the United States since the mid-1930's.

The trial judge in Detroit found, based upon this evidence, that "[g]overnmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area."[67] However, when the court of appeals upheld the lower court's interdistrict remedy, it refused to consider the housing segregation evidence, except as it pertained directly to the school board's policies with respect to the siting of facilities.[68] And the Supreme Court, speaking through the Chief Justice, held that "the case [did] not present any question concerning possible state housing violations,"[69] even though the plaintiffs strenuously urged such grounds in support of the lower court orders.

Similar evidence of governmental responsibility for residential segregation was presented in the Columbus and Wilmington cases, with similar judicial responses. In *Columbus*, the trial judge found that housing segregation there was pervasive and long-standing and that housing choices were "constrained because in reality there is a dual housing market; one for blacks and another for whites,"[70] created and maintained by racially discriminatory practices of federal agencies, local housing authorities, financing institutions, developers, landlords, and real estate brokers, and by the use of restrictive covenants, zoning, and annexation. In *Evans*, the Wilmington case, a three-judge federal court found that "since *Brown*

67. *Milliken*, 345 F. Supp. at 392.

68. *Milliken*, 484 F.2d at 242. *But see* E. WOLF, TRIAL AND ERROR (1981); Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63, in which the theory of reciprocal segregative effects between school board action and residential patterns is criticized both generally and specifically as adopted by the trial judge in the Detroit case. Dimond's book acknowledges and briefly responds to Wolf's latter critique as factually incorrect and drawn from the transcript alone, unaided by a sense of dynamics present during trial of the Detroit case.

69. *Milliken*, 418 U.S. at 728 n.7.

70. Penick v. Columbus, 429 F. Supp. 229, 258 (S.D. Ohio 1977).

governmental authorities have contributed to the racial isolation of city from suburbs," and that these authorities "are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the two decades [after *Brown*]."[71]

The evidence in these specific cases concerning the responsibility of government agencies for residential segregation was amply documented by federal court rulings in other cases which the court did not accept for review,[72] as well as by a large body of social science literature available to the Court.[73] And to make sure the Court could not overlook this enormous body of data, the plaintiffs' lawyers in *Columbus* used a procedurally unorthodox technique and appended a "social science statement" to their brief before the Supreme Court. Signed by thirty-seven prominent scholars, it summarized repeated findings of governmental support, including actions by school boards, of residential segregation and segregated schools.[74] Despite the findings by the lower courts and the experts' statement in this case, the Supreme Court upheld the lower courts' findings of unconstitutional segregation in Columbus and its ordering of a system-wide remedy without at all addressing the responsibility of other governmental agencies for residential segregation.

It should be pointed out that a variety of procedural obstacles influence the degree to which lower court cases progress to the Supreme Court. They might explain, to some extent, why the Court has not explicitly addressed the question of government responsibility, apart from school board action, for segregated schools. The procedural obstacles, about which Dimond's book says very little, stem largely from the fact that only school boards have been before the lower courts as defendants.

Although plaintiffs in several cases have been allowed to present evidence as to the culpability of government agencies other than the school boards for segregated systems, those agencies generally have not been for-

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71. *Evans*, 393 F. Supp. at 438.

72. *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (opposition of city officials to black tenants in public housing project); Metropolitan Hous. Dev. Auth. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (refusal to allow construction of low-income housing accessible to minorities); Shannon v. United States Dep't of Hous. & Urban Dev., 436 F.2d 809 (3d Cir. 1970) (federal agency failure to consider racial composition of area in selecting location for public housing).

73. *See, e.g.*, UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS, 20-25, 200-02 (1967); authorities canvassed in Hart v. Community School Bd., 383 F. Supp. 699, 735-37 (E.D.N.Y. 1974).

74. This statement, with an explanation of how it was prepared, can be found in Orfield, *School Segregation and Residential Segregation*, in SCHOOL DESEGREGATION 227-47 (W. Stephan & J. Feagin eds. 1980). For a helpful review of the important literature on the relationship between housing and school segregation, see Note, *Housing Discrimination as a Basis for Interdistrict School Desegregation Remedies*, 93 YALE L.J. 340 (1983); *see also* Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement*, 17 U.C.D. L. REV. 445, 453 n.26 (1984).

mally before the courts and thus have not had an opportunity to defend against such charges. Since any court determination of liability with respect to these absent parties would have violated due process,[75] it is not surprising that the courts usually have made only generalized findings in this connection, avoiding any formal determination of violation. This was the case, for example, in both the *Swann* and *Columbus* cases.[76] Furthermore, efforts by school boards to bring in federal agencies by way of third-party complaints for the most part have been rejected by lower courts. In doing so, those courts have relied upon the fact that Federal Rule of Civil Procedure 14(a) "normally requires that an impleaded party be legally liable to the main defendant," a condition that school boards are unlikely to satisfy in the school desegregation context.[77]

The usual absence of government agencies other than school boards as defendants in desegregation cases cannot, however, be attributed solely to judicial resistance to their inclusion. Often plaintiffs' lawyers have made a strategic decision not to include them. In most instances, as the long history of school desegregation litigation attests, school boards have been formidable opponents. Plaintiffs' lawyers understandably have felt that adding more defendants would make for even greater difficulties in establishing liability and achieving a desegregation remedy.

What is more, the theory plaintiffs' lawyers were pressing in these cases, one for which Dimond strongly argues, did not necessitate the joinder of other governmental agencies. Plaintiffs contended that if the state—acting through housing, redevelopment, licensing and other agencies—was substantially responsible for the creation and maintenance of segregated neighborhoods, then school boards, also creatures of the state, could be held constitutionally responsible for intentionally establishing and adhering to neighborhood assignment patterns that built upon that

75. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Indeed, in the Detroit case, the court of appeals vacated and remanded for further hearings the trial court's ordering of a metropolitan remedy because the affected suburban districts were "necessary parties" that had to be joined and heard before such a remedy could be mandated. Bradley v. Milliken, 484 F.2d 215, 251–52 (6th Cir. 1973).

76. Supplemental Memorandum dated March 21, 1970, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, app. at 1228a–29a (1971); Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 258–59 (S.D. Ohio 1977).

77. *But see* Hart v. Community School Bd., 383 F. Supp. 699, 752–54 (E.D.N.Y. 1974). There the trial court required local, state and federal housing authorities to be joined in the litigation on the grounds that they were "necessary parties" for the granting of effective relief pursuant to Rule 19 of the Federal Rules of Civil Procedure. The trial court later decided against entering any decree against these and other non-school board defendants in view of their "cooperative spirit" in response to the desegregation order and "the complexity of the matter." 383 F. Supp. at 775. On appeal the Second Circuit rejected the Rule 19 rationale and concluded that the additional parties had been joined improperly. Hart v. Community School Bd., 512 F.2d 37, 40–41, 55–56 (2d Cir. 1975). *Cf.* United States v. Yonkers Bd. of Educ., 594 F. Supp. 466 (S.D.N.Y. 1984) (third party complaint against Department of Housing and Urban Development barred by sovereign immunity).

segregation. School boards could then be ordered to desegregate their systems, even in the absence of other segregative acts. To quote one of Dimond's favorite metaphors, school boards should not be permitted to ignore evidence of state segregative activity in their communities by simply walking through a "magic door" into their administrative offices and selecting neighborhood assignment plans irrespective of their segregative consequences.[78]

An additional obstacle to courts' addressing the responsibility of all government agencies for segregation stems from the fact that, though the pattern has been uneven, the federal government has often played an important role in pressing for school desegregation. Where this assistance has been forthcoming, private plaintiffs have been reluctant to add other federal agencies, HUD for example, as defendants. To do so could alienate at least part of an otherwise sympathetic administration and complicate the role to be played by the Department of Justice as plaintiff in the same litigation. A more promising alternative to joining a federal agency as a party defendant under these circumstances, it was thought, would be to try to achieve some voluntary assistance facilitated by the good offices of the Department of Justice.[79]

Dimond makes clear, moreover, in describing the strategies the plaintiffs' lawyers employed as the four cases moved to the Supreme Court, that they themselves were reluctant to rely heavily upon theories of other governmental agency responsibility for school segregation. As good litigators and lawyers committed to protecting their clients' interests, they saw winning as their primary objective. In the Supreme Court one does so by making arguments that seem familiar to the Justices rather than by suggesting that a favorable outcome requires the creation of new doctrine.[80]

But Dimond properly rejects these procedural and strategic obstacles as explanations for the Court's refusal, in all of the major school desegregation cases of the 1970's, to address directly claims of pervasive governmental responsibility for residential segregation and segregated schools.[81] A far more reasonable explanation is that at least four Justices during that pe-

78. Pp. 239, 251.

79. For a description of this process during the St. Louis school desegregation litigation, see Dee & Huggins, *Models for Proving Liability of School and Housing Officials in School Desegregation Cases*, 23 URB. L. ANN. 111, 182-84 (1982).

80. P. 355.

81. Dimond points out that in Milliken v. Bradley, 418 U.S. 717 (1974), for example, the State of Michigan *was* before the courts and found liable for intentional segregative acts affecting the Detroit school system. He argues that it is difficult under these circumstances to contend on the basis of the Fourteenth Amendment, which speaks directly to states, that Michigan could not have been held responsible for segregative acts of its other creatures and required to devise an appropriate remedy. P. 111.

riod (Powell, Rehnquist, Burger and Stewart) had explicitly rejected such a theory of responsibility. And, though one can only speculate, other Justices may have felt sufficiently tentative about either the merits of the issue[82] or the institutional competence of the judiciary to devise remedies for such "compound" violations[83] to deprive the Court of a working majority in any of the previously discussed school desegregation cases.

Justice Powell made his views on this issue clear as early as *Keyes*, where he observed that "geographical separation of the races . . . resulted from purely natural and neutral non-state causes."[84] Chief Justice Burger and Justice Rehnquist shared this vision sufficiently to join in Powell's 1976 separate opinion on remand in the Austin, Texas desegregation case, where he stated that "[e]conomic pressures and voluntary preferences are the primary determinants of residential patterns."[85] Justice Stewart, in *Milliken*, explicitly ignored the extensive evidence of governmentally fostered residential segregation, both within and outside Detroit. Based upon that selective reading of the record, he concluded that the predominantly black schools in Detroit were "caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes or cumulative acts of private racial fears."[86] Justice Rehnquist made explicit in *Columbus/Dayton II* his view, implicit in the *Austin* concurrence, that residential segregation was a "melange of past happenings prompted by

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82. Some members of the Court may be willing to concede that intentional government action bears some responsibility for segregated residential patterns but resist the notion that it restricts individual choice with respect to housing in the same way that segregative mandatory student assignment plans restrict one's freedom to choose a particular school.

83. This is clearly not an idle concern. Indeed, the trial judge in *Hart*, 383 F. Supp. 699, who had clearly committed himself initially to a comprehensive desegregation remedy, was forced to conclude that a decree running against non-school board officials would be inappropriate: "The decretal tool is poorly designed for restructuring an entire community." 383 F. Supp. 769, 775 (E.D.N.Y. 1974). The Court of Appeals in *Hart* was even blunter with respect to the inappropriateness of the trial judge's allowing the housing officials to be brought in:

> It [the school board] succeeded initially in getting the District Judge to convert a narrow issue involving a single junior high school with a capacity of about 1,000 students into what could only become an issue so broad as to defy judicial competence, a matter which would require coordinated legislative and executive action by three governments, federal, state and city, for a solution.

512 F.2d 37, 41 (2d Cir. 1975). For a comprehensive treatment of the *Hart* litigation, see Fishman, *The Limits of Remedial Power:* Hart v. Community School Board 21, in LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 115 (H. Kalodner & J. Fishman eds. 1978).

84. 413 U.S. 189, 217 (1973) (Powell, J., concurring in part and dissenting in part).

85. Austin Indep. School Dist. v. United States, 429 U.S 990, 994 (1976).

86. Milliken v. Bradley, 418 U.S. 717, 756 n.2 (1974) (Stewart, J., concurring). It is worth noting, however, that Justice Stewart did leave open the possibility that proof of state housing violations of an interdistrict nature bearing on school segregation might warrant an interdistrict desegregation remedy. *Id.* at 755. His suggestion was in fact adopted by courts in both Wilmington, Evans v. Buchanan, 393 F. Supp. 428, 438 (D. Del.) (three-judge court), *aff'd per curiam*, 423 U.S. 963 (1975), and Indianapolis, United States v. Board of School Comm'rs, 456 F. Supp. 183, 189 (S.D. Ind. 1978), *aff'd in part & vacated in part*, 637 F.2d 1101, 1110–11 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

economic considerations, private discrimination, discriminatory school assignments, or a desire to reside near people of one's own race or ethnic background."[87]

V.

One might ask why the Supreme Court's limited view on this issue should be of any concern to plaintiffs' lawyers, apart from the *Milliken* problem, given the bar's notable success in arguing for expanded school board liability for segregated schools, North and South. Dimond's book indirectly poses this question but, given its format, does not pretend to provide any systematic response. Let me suggest a few concerns in this area, the first of which relates to liability. The Supreme Court's silence on whether evidence of governmental discrimination in housing is probative or even relevant in school desegregation cases unduly restricts the way that plaintiffs' lawyers present their cases, that trial courts evaluate evidence, and that appellate courts review lower court findings. In the Dayton case, for example, the trial court refused to hear any such evidence. To the extent that it considered the impact of residential segregation upon the school system, the court's conclusion was that the board was free of any constitutional responsibility for separate schools that might have resulted from such segregation.[88]

To be sure, appellate courts in *Dayton* ultimately found sufficient school board culpability to justify system-wide relief. But the *Dayton* experience suggests that in other lawsuits applying a similar view of housing discrimination evidence, courts may find that highly segregated school systems do not result from school board action, or at least not in ways sufficient to trigger *Keyes* or *Columbus/Dayton* presumptions.[89] In such cases, plaintiffs will be found entitled to only a limited remedy, if any at all. And, given the limits the Supreme Court has imposed in recent years upon appellate court review of factual findings by trial courts in racial discrimination cases,[90] such trial court determinations that school boards are not liable may be effectively insulated from reversal. What this approach invites, in other words, is a determination that the uniform and consistent adherence to a neighborhood assignment plan by one state institution, the school board, will deprive school desegregation plaintiffs of any

87. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 512 (1979) (Rehnquist, J., dissenting).

88. Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974) (describing unreported trial court rulings).

89. *See, e.g.*, Bell v. Board of Educ., 683 F.2d 963, 968 (6th Cir. 1982); Brody-Jones v. Macchiarola, 503 F. Supp. 1185, 1247-48 (E.D.N.Y. 1979).

90. Anderson v. City of Bessemer, 105 S. Ct. 1504 (1985) (review of trial court findings with respect to discriminatory intent subject to Rule 52(a) "clearly erroneous" standard); Pullman-Standard v. Swint, 456 U.S. 273 (1982) (same).

remedy. This will be the result, even where the school assignment plan builds upon residential segregation fostered by other state entities, as well as by federal agencies.

In addition, one cannot overlook, as Dimond's book seems to, the extent to which liability rules announced by the Supreme Court in *Swann*, *Keyes* and *Columbus/Dayton II* contribute to the impression that school boards are being made scapegoats while other governmental agencies get off scot-free for the school segregation to which they contributed. This may produce a situation where trial courts will be reluctant to find the requisite facts to trigger the *Swann-Keyes-Columbus/Dayton* presumptions, particularly where the incumbent board has shown some contemporaneous willingness to address the problem of continued segregation. Under such circumstances, courts might understandably view it as unjust to saddle school boards with the entire desegregative burden, controlling precedent notwithstanding.[91]

The second set of concerns involves remedial considerations. Even where school boards have been found liable for system-wide school segregation and have been required to develop a comprehensive remedy, experience has taught that meaningful, long-term solutions are often beyond the ability of even the most cooperative urban school board. Unless other governmental agencies, either as formal parties or as voluntarily supportive forces, help devise and implement a remedy, prevailing patterns of residential segregation will tend to undermine the ultimate success of a school desegregation plan. One of the most unfortunate outgrowths of the Supreme Court's school desegregation jurisprudence has been that a host of local, state and, most notably, federal agencies, have been able to avoid almost all legal responsibility for sharing the financial and other burdens of achieving desegregation.[92] Were the Supreme Court to establish that other agencies bear liability for segregated schools, more financial and human resources would be directed toward achieving desegregation in the affected community. Dimond suggests (and I agree) that it would also expand the focus of the national public debate over desegregation to include questions about the roles not only of school boards but of all implicated government agencies in remedying residential segregation and the segregated schools that result.[93]

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91. *See, e.g.*, Bell v. Board of Educ., 683 F.2d 963, 968 (6th Cir. 1982); Parents Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 713–14 (2d Cir. 1979).

92. *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284 (1976). See also the recent controversy between the United States Government and the Chicago School Board over what level of federal funding the latter should receive in carrying out a desegregation plan arrived at by way of a consent decree. United States v. Board of Educ., 554 F. Supp. 912 (N.D. Ill. 1983).

93. *See* Yudof, *Nondiscrimination and Beyond: The Search for Principle in Supreme Court Desegregation Decisions*, in SCHOOL DESEGREGATION 97, 115 (W. Stephan & J. Feagin eds. 1980)

Under Supreme Court doctrine, however, only school boards have a constitutional responsibility for remedying segregation, and then only to the extent that they eliminate narrowly defined dual systems.[94] Consequently, even when courts find that system-wide segregation exists and then order a comprehensive remedy, other governmental agencies may act in ways that thwart the school board's implementation of the plan. And even when there are no current actions undermining school boards' plans, the continuing effects of other agencies' earlier practices in promoting and maintaining residential segregation may have a similar result. Yet the Supreme Court directs lower courts to look only at whether the *school board* has discharged its responsibility. If the board has, and the schools remain largely segregated, plaintiffs have no further recourse. This scenario has already taken place in several communities, and is now being played out in a number of proceedings in which school boards deny any further duty to desegregate.[95]

Finally, the Supreme Court's school desegregation jurisprudence has produced unnecessary confusion as to the status of voluntary desegregation efforts. In *Swann* and its companion cases, the Supreme Court suggested that the Constitution allows school boards to adopt "racial balance" student assignment plans for educational reasons.[96] More recently, in the *Seattle* case,[97] the Court upheld a voluntary plan in the face of a state law prohibiting such action. The Court found that the state prohibition was an unconstitutional racial classification that, in addition, impermissibly infringed upon the important principle, extolled in *Milliken*, of local control of public schools. Yet the Court appeared to go out of its way to reserve the question of whether school boards could, consistent with the Fourteenth Amendment, utilize racial criteria in student assignment in the absence of a proven constitutional violation.[98] The record in *Seattle* was silent on this point. Were the Court to take the broader view of governmental responsibility for school desegregation that is being urged

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(discussion of the impact of Supreme Court decisions upon the character of public debate over school desegregation and the costs to that process of the Court's lack of candor); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 145 (1976) (discussing ethical significance of various characterizations of discrimination).

94. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31–32 (1973); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

95. *See, e.g.*, Ross v. Houston Indep. School Dist., 699 F.2d 218 (5th Cir. 1983) (district unitary); Keyes v. School Dist. No. 1, Denver, Colorado, 609 F. Supp. 1491 (D. Colo. 1985) (district nonunitary); Riddick v. School Bd. of City of Norfolk, No. 84-1815, slip. op. (4th Cir. 1986) (district unitary); Dowell v. Board of Educ., 606 F. Supp. 1548 (W.D. Okla. 1985) (district unitary). A recent United States Department of Justice press release reports that 117 school districts have been declared "fully desegregated" and 47 have obtained court orders relieving them of any further duty to desegregate. Dep't of Justice, Press Release (Feb. 18, 1986).

96. *Swann*, 402 U.S. at 16.

97. Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982).

98. 458 U.S. at 472 n.15.

here, school boards would not be precluded from remedying voluntarily the segregative effects of other proven government agency action, irrespective of any liability on their part.

The Court's restricted view of the sources of school segregation also was responsible for the unfortunate result in *Crawford v. Los Angeles Board of Education*.[99] In that case, California courts had ordered the desegregation of a Los Angeles school based upon the Supreme Court of California's determination that California's state constitution required such steps, irrespective of whether the school board was responsible for the segregation. Subsequently, California voters ratified a proposition that limited court authority to order desegregation only to situations where the Fourteenth Amendment would so require. As a result, court-ordered desegregation of Los Angeles was halted, because the record reflected only a "passive maintenance by the Board of a neighborhood school system in the face of widespread residential racial imbalance . . . ."[100] "A school board," said the California appellate court, "has no duty under the Fourteenth Amendment to meet and overcome the effect of population movements."[101]

The Supreme Court viewed the restricting proposition not as an impermissible racial classification like that in *Seattle*, but rather as a decision by the California electorate against continuing "to do more" than the United States Constitution requires. The *Crawford* decision further reinforces the concept of a state as a fragmented, rather than a unitary, institution. Again, the state remains free to avoid responsibility for segregated schools. Courts are directed to focus solely upon the school board's actions, while ignoring the many ways in which other state (and federal) agencies have promoted and maintained the conditions that allow such segregation to persist.[102]

VI.

Recent developments since the publication of *Beyond Busing* suggest, however, that the Supreme Court soon may be faced squarely with the question it has thus far avoided. The Yonkers, New York, school desegregation lawsuit decided last November is a case in point. In December 1980, the United States Department of Justice brought a desegregation suit against the City of Yonkers, a community in Westchester County only

99. 458 U.S. 527 (1982).

100. Crawford v. Board of Educ., 113 Cal. App. 3d 633, 645, 170 Cal. Rptr. 495, 503 (Cal. Ct. App. 1981).

101. 113 Cal. App. 3d at 646, 170 Cal. Rptr. at 503.

102. In *Crawford*, the Court also made clear that it was not passing on the constitutionality of California's earlier desegregation standard. 458 U.S. at 535 n.11.

a few miles north of New York City. The complaint named as defendants the City of Yonkers, the Yonkers Community Development Agency (CDA), and the Yonkers Board of Education, and it alleged that these agencies had, in administering Yonkers' school system and public housing programs, violated Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, and the Fourteenth Amendment. More specifically, the Department of Justice alleged that the City of Yonkers, acting with and through CDA and its school board, had implemented a policy of racially motivated discrimination that produced unlawful racial segregation in the public schools and in housing patterns throughout Yonkers.[103]

In March 1981, the Yonkers Branch of the NAACP, along with a black resident of Yonkers, moved to intervene. The individual black plaintiff-intervenor sought to represent a class of "all black residents of Yonkers who are currently residents of, or eligible to reside in, publicly assisted housing in Yonkers, or who are parents of students currently attending public school in Yonkers."[104] After receiving leave to intervene and certification as a class action, the plaintiff-intervenors amended their complaint to add a claim against the United States Department of Housing and Urban Development (HUD).[105] This claim was settled through a consent decree prior to trial.[106]

After a lengthy trial, the federal district judge issued an opinion finding defendants liable on both school and housing segregation claims as charged by the Department of Justice. The court found that the extreme concentration of subsidized housing in one heavily-minority area of the city was the result of a more than thirty-year pattern of racially discriminatory conduct by city officials. The court concluded that the city followed this course in response to white constituent pressures to select or support only sites that would preserve existing patterns of racial segregation and to reject or oppose sites that would have desegregative effects. It was clear, said the court, that "but for" the "chronic and pervasive influence" of race, a "significantly different" configuration of subsidized housing would have arisen.[107]

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103. United States v. Yonkers Bd. of Educ., 518 F. Supp. 191 (S.D.N.Y. 1981).

104. United States v. Yonkers Bd. of Educ., No. 80 Civ. 6761 (LBS) (S.D.N.Y. Nov. 20, 1985).

105. United States v. Yonkers Bd. of Educ., 594 F. Supp. 466, 468 (S.D.N.Y. 1984).

106. Under that consent decree, HUD agreed to make available to the City of Yonkers funding for 200 units of two bedroom or larger housing to be located east of the Saw Mill River Parkway, a predominantly white area. Additionally, it agreed to make available 175 family certificates to be used east of the Parkway. With these certificates, families can obtain housing at prevailing rates and receive government subsidies to defray a significant portion of the cost. United States v. Yonkers Bd. of Educ., No. 80 Civ. 6761 (LBS) (S.D.N.Y. Mar. 19, 1984) (order approving consent decree).

107. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1376 (S.D.N.Y. 1985). For an excellent recent survey of the segregated nature of public housing in the United States, see Flourney

The court concluded, moreover, that although the record demonstrated no consistent pattern of segregative school openings or closings or racial gerrymandering of attendance lines that had system-wide segregative impact, individual instances of such segregative practices had occurred. Furthermore, said the court, the Board had engaged in four types of unlawful discriminatory acts and omissions, all with system-wide impact, that had perpetuated both racial segregation in public schools and discriminatory attitudes in the Yonkers community. Two of these practices, the racial assignment of faculty and administrative staff, and that of secondary school students, fit into the mold of many other Northern school cases. The remaining two violations, discriminatory practices in vocational and special education, have not been commonly found, though there is evidence to suggest that similar patterns exist elsewhere.[108] Finally, the court found that the city's housing practices, the mayoral appointment of school board members, and other city involvement in school affairs were more than adequate evidence of the city's intentional perpetuation and exacerbation of racial segregation in Yonkers' public schools.

The trial court's findings of fact and conclusions of law alone suffice to justify labelling the *Yonkers* decision as "unprecedented." But what truly distinguishes it from prior school desegregation cases in the federal court system is that it squarely adopts the theory of "state-action" urged upon the Supreme Court by Justice Douglas thirteen years ago in *Keyes*.[109] To quote the trial judge in *Yonkers*:

> It is indisputable that a hypothetical single state agency which controls the operation of, and engages in the racial segregation of, both housing and schools—by confining for racial reasons the city's subsi-

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& Rodriguez, *Separate and Unequal*, Dallas Morning News, Feb. 10–17, 1985.

108. *See* M. REBELL & A. BLOCK, *supra* note 5, at 113–33.

109. *See* Keyes v. School Dist. No. 1, Denver, Colorado, 413 U.S. 189, 214 (1973) (Douglas, J., concurring). Admittedly, the trial court in *Hart* did likewise. That decision is of limited precedential value, however, because the court in *Hart* based liability of governmental agencies upon a finding of "natural and foreseeable consequences," rather than "discriminatory intent." 383 F. Supp. 699. The former test has been rejected as inappropriate to determine the presence of a constitutional violation. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979). Plaintiffs in *Bell v. Board of Educ.* also named the City of Akron, the city housing authority, and the Ohio Real Estate Commission president as defendants, along with the school board. 491 F. Supp. 916, 917 (N.D. Ohio 1980). The complaint contained no federal Title VIII (Fair Housing Act) claims. The trial court found against the plaintiffs on their constitutional housing discrimination claims. The court of appeals affirmed on grounds of res judicata, finding that an earlier lawsuit had determined that the school system was not unconstitutionally segregated. 683 F.2d 963, 965–67 (6th Cir. 1982). Of course, the court in *Yonkers* had before it a rather focused claim of non-school board governmental discrimination, namely the locating of public housing to maintain residential segregation. It did not have to resolve, therefore, broader claims like those raised in earlier cases of state action affecting choice in the *private* housing market. These claims, relating to enforcement of restrictive covenants; discrimination in appraisal, financing, and licensing; and segregative land use practices, present far more difficult questions, going to both liability and remedy, than those raised in *Yonkers*.

> dized housing to one section of the city, while simultaneously adhering to a neighborhood school policy of student assignment—can be held liable for such conduct. It is inconceivable that state action may be fractionalized such that two state agencies could be permitted to collectively engage in precisely the same conduct, yet avoid legal accountability for the identical result.[110]

This view of state action allowed the court not only to find the city responsible for school segregation based in large part upon its segregative housing practices, but also to impose liability upon the *school board* for its failure to take desegregative action to overcome the effects of the city's segregative housing practices, an approach that has been generally eschewed by the courts. What the *Yonkers* court said, however, is that where the neighborhoods were intentionally segregated by the action of one state agency (in this case, the city), another state agency (the school board) cannot sit idly by, utilizing a neighborhood assignment plan that reproduces that residential segregation in the schools. And where this has occurred, the board's consistent refusal to take desegregative actions *does* constitute a violation of the Fourteenth Amendment.

The *Yonkers* case provided the court with the proper parties and the occasion, free of the procedural complications normally experienced in school desegregation lawsuits, to consider fully what forces propelled by which state actors create and perpetuate segregated schools. Only review by higher courts will tell us whether the trial judge was correct in the *Yonkers* case. Given the court's careful and extensive treatment of the factual record there is strong reason to believe that its determinations will withstand appellate scrutiny. This is not to say that the court was necessarily correct in the answers it gave as to the culpability of city, housing, and school officials. Nor does it suggest that courts in other school desegregation cases will find the same mix and range of segregative governmental action.[111] But it is to emphasize that the court asked the right questions, questions that properly deserve to be addressed in any urban school desegregation case.

The case may not be appealed.[112] One is tempted, given the need for candor in the Supreme Court on these issues, to hope that an appeal is taken. On the other hand, common law tradition aside, a settlement of the

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110. United States v. Yonkers Bd. of Educ., No. 80 Civ. 6761 (LBS) (S.D.N.Y. Nov. 20, 1985).

111. Indeed, the trial court in *Bell v. Board of Educ.* concluded that there were no housing violations in that case. 491 F. Supp. at 942–48.

112. Though the situation appears somewhat unsettled at this point, recent news reports indicated that the defendants have decided to appeal the desegregation order. *See* Feron, *Yonkers Schools Defy City Council*, N.Y. Times, June 12, 1986, at A32, col. 1; *Yonkers Between Justice and Contempt*, N.Y. Times, June 13, 1986, at A34, col. 1; *School Board Plans Appeal in Yonkers Segregation Case*, N.Y. Times, June 29, 1986, at 31, col. 2.

Yonkers case would offer, in my estimation, a rare opportunity for a community and its citizens, working with the federal government and private plaintiffs, to develop remedies that have a genuine chance of producing successful and stable desegregation. In particular, it would present a challenge to those who claim support for school desegregation but who oppose busing to devise housing remedies that produce integrated neighborhoods serving neighborhood schools.[113]

This is clearly what Dimond would like as well. In some quarters, there may be a tendency to regard plaintiffs' lawyers in school desegregation cases as zealots committed to "massive cross-town busing to achieve racial balance" irrespective of the attendant costs. However, if Dimond is representative of plaintiffs' lawyers in these cases, and I think he is, such charges could not be further from the mark. His book is an invitation to a dialogue, not a debate, over school desegregation. It does not claim to have all the answers, but only to ask questions that our society would rather ignore.

If the Yonkers case is appealed, the Second Circuit will have to address the conception of state action that is at the heart of the trial court's opinion. And should this case ultimately reach the Supreme Court, I would hope that the Court would recognize, however it decides the merits of the Yonkers school situation, that black and Hispanic children locked in segregated schools throughout the Nation deserve a better answer than that they have no claim whenever school boards simply incorporate into their student assignment plans our country's equally segregated residential patterns. *Brown* deserves a better legacy than what Dimond calls "our contemporary, albeit substantially sanitized, form of apartheid."[114]

Is there a philosopher in the house?

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113. This Review is not the occasion for a comprehensive discussion of school desegregation remedies and the ways that findings of liability against governmental agencies other than school boards might affect the remedial process. I want to make clear, however, that I do not mean to minimize the complexity of remedial questions in this field, which has been treated comprehensively of late in Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983), and Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041 (1984), among other works. Presumably the model I suggest presents even greater challenges. Even where a court has found non-school board governmental agencies liable for producing segregated neighborhoods, it has several remedial options. It can order a remedy that involves just the schools; it can direct its efforts to desegregating housing; or it can choose a combination of both. The major problem will be, undoubtedly, one of devising appropriate criteria to guide a court's selection from among these alternatives. A plan supported, in terms of financial as well as human resources, by several government agencies may, however, produce substantially less disruption than a plan for which a school board is solely responsible. Moreover, I am unwilling to presume that, in the event defendants default, federal courts will be unequal to the task of devising plans that represent a "nice adjustment and reconciliation between the public interest and private needs." Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

114. P. 402.